

March 17, 2011

**VIA ELECTRONIC SUBMISSION**

The Honorable Hilda Solis  
Secretary  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

Thomas Dowd  
Administrator  
Office of Policy Development and Research  
Employment and Training Administration  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Room N-5641  
Washington, DC 20210

***Re: Wage Methodology for the Temporary Non-Agricultural Employment-H-2B Program; Final Rule; 76 Fed. Reg. 3452 (January 19, 2011).***

Dear Secretary Solis and Mr. Dowd,

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small entities before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>1</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>2</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

On January 19, 2011, the Department of Labor (DOL) issued a final rule changing the wage methodology for the temporary non-agricultural employment of foreign workers under the H-2B visa program.<sup>3</sup> The final rule increased the wages by industry for H-2B workers by \$1.23 to \$9.72 per hour, effective for wages paid for work performed on or

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<sup>1</sup> 5 U.S.C. § 601 et seq.

<sup>2</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>3</sup> *Wage Methodology for the Temporary Non-Agricultural Employment-H-2B Program; Final Rule*, 76 Fed. Reg. 3452 (Jan. 19, 2011).

after January 1, 2012.<sup>4</sup> In the final rule, DOL specifically welcomed information from the public on the feasibility, and implementation of phasing in the new prevailing wages. This was the notice stating the reason behind this request: “The Department recognizes that rapid wage increases may create burdens for employers that choose to participate in the H-2B program, while also providing potentially higher wages for U.S. and H-2B workers hired under the program.”<sup>5</sup>

### **Advocacy Submitted a Comment Letter Citing Concerns with DOL’s H-2B Rule**

Advocacy submitted a public comment letter on October 27, 2010, citing small business concern that this rule will have a significant economic impact on a substantial number of small businesses.<sup>6</sup> The wage increases finalized by DOL will hurt seasonal small businesses that are seeking a legal means to hire foreign workers due to the shortage of available U.S. workers willing to do unskilled and temporary work, and may shut small businesses out of this vital program. Advocacy’s comment letter recommended that DOL consider significant alternatives to this rulemaking that would meet the agency’s objectives without jeopardizing small businesses.

Advocacy continues to believe that DOL’s Regulatory Flexibility Analyses are inadequate, as discussed in Advocacy’s comment letter. Advocacy is also still concerned that DOL has shown no data in the final rule to support the notion that wages of H-2B workers have depressed the wages of similar domestic workers, a premise that is central to DOL’s justification for these wage increases.

### **DOL Should Consider a Phase-In Based on Business Size or Economic State**

Advocacy was pleased that DOL delayed the implementation of the increased wages by almost a year in recognition of the costs of this rule on small entities, making this rule effective for wages paid for work performed on or after January 1, 2012.<sup>7</sup> However, this extended implementation date only delays the high costs of this rule by one year, and does not solve any of the problems that these small businesses will face the next season when they attempt to hire temporary workers. Many small entities have stated that these high costs will shut them out of the H-2B program next year, resulting in these businesses reducing operations or closing completely.

Advocacy applauds DOL for seeking comment on alternatives such as a phase-in period for these new high wages. However, we note again that a phase-in period will not solve the underlying problems with the methodology utilized to increase wages.

That said, Advocacy is also concerned that DOL is not considering two viable options for a phase-in period. DOL has stated that “it believes its responsibility to set the prevailing wage is most effectively fulfilled without regard to size or economic state of the

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<sup>4</sup> 76 *Fed. Reg.* at 3476.

<sup>5</sup> *Id.* at 3462.

<sup>6</sup> Comment letter from Winslow Sargeant, Ph.D., Chief Counsel and Janis Reyes, Assistant Chief Counsel, SBA Office of Advocacy to the Honorable Hilda Solis, Secretary, and Thomas Dowd, Administrator, U.S. Department of Labor (October 27, 2010) at: <http://www.sba.gov/content/letter-dated-102710-department-labor-employment-and-training-administration>.

<sup>7</sup> 76 *Fed. Reg.* at 3482.

employer.”<sup>8</sup> Section 603(c) of the RFA advises agencies that size and economic state of the employer are the very types of regulatory alternatives that they must consider at a minimum.<sup>9</sup> Advocacy would support any significant regulatory alternative recommended by small entities or provided by DOL that would actually minimize the impact of this rule on small entities.

### **Conclusion**

Advocacy is still concerned that DOL’s final rule increasing H-2B wage rates will hurt small businesses that are seeking a legal means to hire foreign workers, and may shut small businesses out of this vital program. Advocacy applauds DOL for taking steps to minimize the impact of this rule on small entities, by delaying the implementation of the increased wages and by asking the public to comment on alternatives such as a phase-in period. Advocacy would support any significant regulatory alternative recommended by small entities or provided by DOL that would actually minimize the impact of this rule on small entities. Please contact me or Janis Reyes at (202) 205-6533 ([Janis.Reyes@sba.gov](mailto:Janis.Reyes@sba.gov)) if you have any questions or require additional information.

Sincerely,

//signed//  
Winslow Sargeant, Ph.D.  
Chief Counsel for Advocacy

//signed//  
Janis C. Reyes  
Assistant Chief Counsel

cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs

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<sup>8</sup> 76 *Fed. Reg.* at 3462.

<sup>9</sup> 5 U.S.C. § 603(c).